IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 34

STEWART L. UDALL, Secretary of the Interior,
Petitioner

v.

JAMES K. TALLMAN, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

CHARLES F. WHEATLEY, JR.
ROBERT L. MCCARTY
MCCARTY AND WHEATLEY
1201 Walker Building
Washington, D. C. 20005
Counsel for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

This controversy involves only the determination of the respective rights of conflicting applicants to ten oil and gas leases on approximately 25,000 acres of the Kenai National Moose Range in Alaska. It is con-

ceded that if two withdrawal orders closed the lands to leasing, the court of appeals must be affirmed. Thus the two questions presented are:

1. Whether Executive Order No. 8979 which in creating the Kenai National Moose Range withdrew certain lands therein from "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska" closed those lands to oil and gas leasing.

2. Whether Public Land Law No. 487, which withdrew other lands in the Kenai National Moose Range [left available by Executive Order No. 8979 to use and disposition under the public land laws] from "settlement, location, sale or entry", closed those lands to oil and gas leasing.

STATEMENT OF THE CASE

Contrary to the broad "consequence" seen by the petitioner, the District of Columbia Circuit made no ruling that all the leases within the Kenai National Moose Range are subject to cancellation. All that the court below decided was that the ten respondents were entitled to individual leases aggregating about 25,000 acres over conflicting applications on the same acreage filed by representatives of certain major oil companies. In reaching this result the court of appeals had before it all of the specific orders and actions thereunder by the Department dating back to 1941 relating to the Kenai National Moose Range, as well as the Departmental regulations pertaining to wildlife refuges in general. Since this detailed history is not discussed in Petitioner's statement of the case despite indication at the outset of the opinion below that

this chronology was relevant to the decision (R. 83), the major events in sequence are outlined below:

The order of December 16, 1941. President Roosevelt by Executive Order No. 8979 of December 16, 1941 (6 F.R. 6471; App. A hereto) established the Kenai National Moose Range. The special purpose of the withdrawal to protect the unique species of giant Kenai moose was expressly stated in the order as follows:

> * * * for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose * * *

As to the lands within the refuge involving all respondents except Coyle, the Executive Order specifically provided:

> None of the above-described lands excepting Tps. 5N., Rs. 8, 9, 10, and 11W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the

act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: * * *

The Executive Order in 1941 was in conformity with the established practice of the President in withdrawing land for wildlife purposes from disposition under the public land laws to expressly provide in the order if the lands were to remain open to leasing under the Mineral Leasing Act.[1] No such express proviso was included in the Kenai Order.

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[1] For example, Executive Order No. 7522 by President Roosevelt on December 21, 1936 (1 F.R. 2184), creating the Charles Sheldon Antelope Range expressly provided:

> * * * the lands . . . are hereby withdrawn from settlement, location, sale, or entry and reserved and set apart . . . *Provided*, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, *leasing*, or patenting the mineral resources of the lands under the applicable laws * * *. (Emphasis added)

See Executive Orders 8038 and 8039 by President Roosevelt of 1939 (4 F.R. 391) creating the Cabeza Pireta Game Range and Kofa Game Range respectively for identical language. And in 1943, a Public Land Order by Acting Secretary of the Interior Abe Fortas establishing the Columbia National Wildlife Refuge expressly provided:

> * * * the following described public lands . . . are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining laws, *but not the mineral leasing laws*, * * * (P.L.O. 243; 9 F.R. 11400). (Emphasis added)

For further discussion and other orders see *infra*, p. 34; Appendix D hereto.

The Executive Order creating the Kenai moose refuge, however, did not withdraw the entire area from disposition under the applicable public land laws but excepted a certain area (in which the lands selected by Respondent Coyle are located) as follows:

> * * * *Provided, however,* That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and and use as a part of the national moose range shall be without interference with the *use and disposition* thereof pursuant to the public-land laws applicable to Alaska * * * (Emphasis added.)

The Director of the Fish and Wildlife Service commenting on the purpose of the Range prior to its establishment by the President made clear the intent of the order that only the excepted portion would be available for "use and disposition" under the Alaska public land laws:

> * * * The intention of the proclamation as the draft is now drawn is to make all of the area described a part of the refuge, but leaving the six mile strip along the shores of Cook Inlet and Kachemak Bay available *for use and disposition* pursuant to the public land laws applicable to Alaska. *Other than the 6 mile strip as described in the draft, it is the intention that the remainder of the refuge area be reserved from settlement, location, sale or other disposition under any of the public lands laws applicable to Alaska* * * *. (R. 69; emphasis added.)

The order of June 16, 1948. Public Land Order No. 487 of June 16 1948 (13 F.R. 3462; App B hereto) pertained only to the excepted area of the moose

refuge above described. It withdrew some, but not all of the excepted area as follows:

> * * * the public lands within the following described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation:
>
> * * * *
>
> This order shall take precedence over, but shall not modify . . . the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941 * * *

The general suspension order of August 31, 1953. In 1953 the Department of the Interior undertook a general study of those wildlife refuges, or portions of wildlife refuges, which were "otherwise available for leasing" to determine whether such leasing was consistent with the protection of wildlife therein. Pending completion of the study, the Department on August 31, 1953 issued a general order suspending "action on all pending oil and gas lease offers and applications for lands within such refuges." (See R. 41)

As of the date of this order, the Range lands were thus in three categories: (1) a large portion withdrawn from any disposition under the public land laws applicable to Alaska by the terms of the 1941 Executive Order; (2) part of the excepted area of the Range, originally left available to disposition and use under the public land laws but withdrawn by the 1948 public land order; and (3) that portion of the excepted area not withdrawn by the 1948 public land order, but suspended by the 1953 order from any action on "pending oil and gas lease offers." This was the status of the

lands when the oil company representatives (to whom the Anchorage Land Office subsequently granted leases in the present case conflicting with Respondents' applications) filed their oil and gas lease offers between October 16, 1954, and January 28, 1955. Nine of the conflicting offers were in category (1), and one, contrary to the Coyle offer, was in category (2).[2]

The order of September 9, 1955 and its amendment. Public Land Order No. 1212 issued September 9, 1955 (20 F.R. 6795), revoked in its entirety Public Land Order No. 487 of June 16, 1948. As noted by the court of appeals, (R. 84), the order provided initially that a small piece of land (not involved in the present suit) was:

> 2. Subject to valid existing rights . . . withdrawn from all forms of appropriation under the public-land laws, including the mining, *but not the mineral-leasing laws,* and reserved under the jurisdiction of the Bureau of Land Management, Department of the Interior, for recreational purposes. . . . (Emphasis added.)

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[2] The petitioner's dehors the record assertion that in 1953, a lease issued within the area covered by Executive Order 8979 (Pet. Br. p. 12) without describing where, is meaningless. Respondents' investigation reveals that apparently this lease, as well as others prior to 1955, was intended to be issued for lands completely outside the Moose Range on lands never closed to oil and gas leasing.

Respondents deplore the repeated resort to unfounded evidence not in the record, which respondents have had no opportunity to challenge in a judicial proceeding. The petitioner should be estopped from now so relying by its representations to the District Court below in support of its motion for summary judgment that no genuine issue of fact existed and that the case was appropriate for decision based on the administrative record and statements under Rule 9 (h) (R. 76-79).

The order then proceeded to deal with the remainder of the land restored. After granting preference for home-steading, for certain periods of time under section 4, sections 6 and 7 provided as follows:

> 6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally as may be authorized by the public-land laws, *including the mineral-leasing laws.* * * *
>
> 7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, *including leasing under the mineral-leasing laws.* * * * (Emphasis added.)

On October 14, 1955, Public Land Order No. 1212 was amended to delete the provisions for leasing under the mineral leasing laws appearing in paragraphs 6 and 7 of the order but not in paragraph 2. (20 F.R. 7904.)

The amended regulations of December 8, 1955. On this date the Department amended its general regulations pertaining to wildlife areas (43 C.F.R. 192.9 (Circular 1945); 20 F.R. 9009; Pet. App. 3a.).

These regulations did not state, as did the subsequent regulations of January 8, 1958, *infra,* pp. 12, 44-45, that they were to apply to all refuges or portions of refuges, even to those which by the terms of their withdrawal order were closed to oil and gas leasing. The regulation contained two appendixes: Appendix A

listed lands thereafter closed to leasing;[3] Appendix B listed lands thereafter to be available to oil, and gas leasing, but only upon the prior approval, within six months, of an operating program for the area by the Director, Fish and Wildlife Service, to insure protection of the wildlife:

> * * * Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation, except that; on those areas designated by the Fish and Wildlife Service as wilderness, recreational, water development, or marsh, with respect to which the Fish and Wildlife Service reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. All pending applications on such excepted wilderness, recreational, water development, and marsh areas will be rejected unless within 6 months the applicant files an operating program sufficient to accomplish these purposes. Areas in this category are listed in Appendix B.

Appendix B expressly listed certain areas within the closed portion of the Kenai Moose Range as follows:[4]

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[3] No lands within the Kenai Range were listed in Appendix A. A review of the orders creating each of the refuges listed shows that none contained language similar to that of the Kenai Order closing them to oil and gas leasing.

[4] Appendix B also listed other wildlife refuges which were closed by the terms of the orders creating them (i.e. The Salt Plains Refuge in Oklahoma, 8 F.R. 9430), as well as others that were expressly open (i.e. Columbia Nat'l Wildlife Refuge, 9 F.R. 11400).

Appendix B—Fish and Wildlife Service Lands available for leasing under a Satisfactory Development and Operating Plan.

* * *

Kenai: The following areas and all lands within one mile of Tustemena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River Hidden Lake, Kasilof River, and Chickaloon Flats.

The Pettioner relies on extra-record evidence regarding the issuance of leases within the Kenai range prior to 1958, which involve for the most part the leases in an area known as the Swanson River Unit (Brief pp. 12-13). However, the facts are that within the six-month period specified in Appendix B an operating program was submitted and in 1956 the Department authorized the issuance of a group of 31 leases comprising the 71,680 acres of the Swanson River Unit under the procedures expressly provided for Appendix B lands (Resp. App. E hereto).[5] Thus the Department in fact treated the Swanson River Unit as governed by Appendix B procedures, even though it was apparently not located within the area specified in that Appendix.[6] Other than this unit it does not appear

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[5] Although the Solicitor General designated the entire record for printing, this and other items in the Supplemental Transcript from the Court of Appeals were not printed, apparently by mistake. Respondents' Appendix A was contained in that transcript at page 182.

[6] The Government in its reply brief to the petition for a writ of certiorari stated that the leases comprising the Swanson River unit were not within the lands listed in this Appendix and specified the exact distances each listed mark from the Swanson River Unit. (Reply brief p. 3). The Geological Survey's map of the Kenai area does not show each landmark, but those shown affirm the Government's statement.

that any other operating programs were submitted for lands in the withdrawn area.

Reimposition of general suspension of leasing in 1956. The Director of the Bureau of Land Management in a general order in 1956 affecting all wildlife refuges or portions of such refuges "remaining open to leasing" (R. 41-42), again suspended all "disposition by lease or otherwise or the granting of any use of such lands."

Leases issued prior to 1958. The petitioner at page 12 of his brief alleges that a number of leases were issued within the Moose Range for various years prior to 1958 based on an alleged ex parte off the record investigation of Anchorage land records (see Pet. Br., pp. 12-13; see note 2, p. 7, *supra*). However, petioner neglects to advise the Court as to the particular status of the lands upon which those leases were issued. A map submitted by the oil companies with their unsuccessful motion for leave to file as amici curiae in the court of appeals shows that all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941 Executive Order, or were in the Swanson River Unit which, as seen above (pp. 10-11), was treated as authorized by Appendix B procedures by the regulations of December 8, 1955 (Tr. 146; map reproduced as Resp. App. F hereto).[7] Based on this map, other than

[7] The map shows a number of leasing blocks in the open area which are cut short at the boundary between the open and withdrawn areas of the Moose Range, thus showing that the Department must have in fact treated the withdrawn area as closed. The map shows further that there were offers filed prior to 1958 in the open excepted area of the Range which were not acted upon until after the 1958 order, presumably because suspended by the general suspension orders above noted.

in these two special areas of the Moose Range no oil and gas leases were issued for the withdrawn lands within the Range, including the lands in dispute here, from the time the Range was created in 1941 until the Land Office action in 1958 here contested.

The general regulations of January 19, 1958 and the Kenai Range order of August 2, 1958. The specific order by which the Range lands involved in this case first clearly became available for leasing was Secretary of Interior Seaton's order of August 2, 1958.[8] This order followed a complete revision of the general regulations, issued January 10, 1958, expressly pertaining to all wildlife lands.

The new January 1958 general regulations (23 F.R. 227, 43 C.F.R. § 192.9 (1963); Pet. App. 5a) followed a comprehensive examination of all wildlife lands owned by the United States, regardless of whether they had been previously closed or open to oil and gas leases. It provided that "no offers for oil and gas leases will be accepted" and "no leases . . . will be issued" on any lands defined as "wildlife refuge lands,"

> * * * even though such lands . . . by the terms of *the withdrawal order, may be subject to mineral leasing* (43 C.F.R. § 192.9(a)(1); 192.9(b)(1); emphasis added)

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[8] The Secretary conceded below that with respect to this area, no leasing was possible prior to the order of August 2, 1958, but argued that this resulted from the suspension orders and did not preclude the filing of lease offers prior to the effective date of the January 10, 1958 regulations (R. 41, 45). It is curious, however, that the Department issued leases in the excepted portion of the Range prior to 1958 by making individual waivers of the suspension orders, but never followed a similar procedure with respect to the withdrawn area of the Range. The Secretary further conceded that the Moose Range was closed to oil and gas lease offers between January 10, 1958 and August 14, 1958 (R. 43).

This did not affect the Kenai Moose Range, even though the Range was within the definition of "wildlife refuge land,"[9] due to another provision of the regulation expressly authorizing future leasing of lands in Alaska wildlife refuges.[10] All Alaska wildlife areas are treated the same under the new regulation whether previously open or closed to oil and gas leasing with such lands to be available for leasing if, and only if, specific agreements could be worked out between the Bureau of Land Management and the Fish and Wildlife Service to protect the wildlife.

Within a few weeks after promulgation of these regulations, the Secretary classified lands in the Kenai National Moose Range for oil and gas leasing, stating in a press release issued January 29, 1958:

> I have approved this week classification of the Kenai Moose Range in the Territory of Alaska which delineates those areas which will be opened and closed to development. * * *
>
> * * * *
>
> I am assured by Assistant Secretary Leffler that this action *opening a portion of the Kenai range* subject to the proposed regulated development is entirely consistent with the primary purpose for which the range is managed. (R. 15; emphasis added.)

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[9] The Departmental Wildlife regulations in effect prior to this time expressly listed the Kenai Moose Range as a "wildlife refuge." 50 C.F.R. § 25.1 (1963)

[10] Thus the 1958 regulations prohibited any leasing or lease offers in all wildlife refuge lands in the continental United States, but by definition permitted such leasing in Alaska refuges only if in the future the Bureau of Land Management and Fish and Wildlife Service should so decide, with approval of the Secretary.

This was followed by Secretary Seaton's order of August 2, 1958 (23 F.R. 5883; Pet. App. 9a), which after referring to a consummated agreement necessary to protect wildlife, provided:

> *Closed area.* The following described lands within the boundaries of the Kenai National Moose Range, Alaska, *are not opened to oil and gas leasing:* . . . (Emphasis added.)

The lands described as *not opened* involved for the most part lands in the southern part of the Range and did not embrace any of the lands involved in this case, which are in the northern part of the Range. The northern lands *opened* by this 1958 order, embraced both the area originally withdrawn by the 1941 order as well as the excepted area, which the 1941 order left open but on which leasing had been suspended at various times prior to 1958. As to these now opened lands, the August 2, 1958, order provided:

> * * * Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulation.
>
> * * * *
>
> In accordance with the regulation 43 CFR 192.9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a.m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with

the procedure outlined in the regulation 43 CFR 295.8.[11]

Departmental action in this case. On August 14, 1958 respondents duly filed their respective offers to lease in accordance with the procedure specified in the Secretary's order of August 2, 1958. About a year later, on September 4, 1959, the Land Office held a public drawing pursuant to the provisions of 43 C.F.R. 295.8 (see R. 18-26) to determine priorities, as required by the August 2, 1958 order. At the drawing, respondents' lease offers were the first drawn for the lands involved in this case.

Sometime in the fall of 1958, after respondents had filed but without any notice to them, the Anchorage Land Office issued leases for the lands in question to the representatives of the major oil companies, based on the offers filed by them between October 15, 1954

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[11] 43 C.F.R. 295.8:

Processing of simultaneous applications. All applications, which term includes offers to lease, filed pursuant to the regulations in any part of this chapter will be regarded as having been filed simultaneously within the meaning of this section where by reason of an order of restoration or opening, or a notice of the filing of a plat of survey or resurvey, they are filed in the manner and within the period of time for the filing of simultaneous applications provided for in such order or notice. • • •

• • •

(b) All such applications *which conflict in whole or in part will be included in a drawing* which, except as provided in paargraph (c) of this section will fix the order in which the applications will be processed.

• • •

(c) All applications included in the drawing will be subject to any priority to which any particular applicant may be entitled on account of a preference right conferred by law or regulations. (Emphasis added.)

and January 28, 1955. Assigning this leasing action as its reason, and despite respondents' success in the drawing, the Anchorage Land Office in a decision dated October 7, 1959, notified respondents for the first time that their lease offers were rejected.

Respondents appealed the decision of the Anchorage Land Office to the Director of the Bureau of Land Management and from there to the Secretary of the Interior, where the deputy solicitor of the Department decided that the prior action of the Land Office should stand. After a petition for rehearing was denied by the same deputy solicitor, the action below was filed in the District Court. On appeal from a judgment for Petitioner, the court of appeals in a unanimous decision by Judges Bastian, Miller and McGowan, reversed and granted judgment for respondents (R. 82-95).

SUMMARY OF THE ARGUMENT

I

The Government depicts a significance for this case which it simply does not have. The case does not concern all the leases issued within the Kenai Range; it involves only ten. And an affirmance of the decision below need not have an adverse effect on any leases other than the ones involved here. No one can challenge those leases, and in the absence of a challenge the Secretary need not cancel them. However, if the Court thinks otherwise it should give its decision prospective effect only.

II

Executive Order No. 8979 by its terms closed the lands upon which nine of the ten Respondents filed applications to mineral leasing. This order closed

certain lands to "settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska . . ." but excepted a portion of the range from this withdrawal specifying that their use as a part of the range "shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska." When the reciprocal provisions are read together it becomes clear that the order intended to close the lands to all forms of use and disposition except as otherwise expressly provided. This intent is further manifested in the use of the term "disposition," which was used by Congress in the Mineral Leasing Act and applied by the courts in connection with mineral leasing. The parenthetical exception for fish trap sites is further evidence that the term must be given an expansive meaning, for such sites are licensed, not deeded.

Both the Executive Order and Public Land Order No. 487 use the language "settlement, location, sale, or entry" and this language without more effects a withdrawal from oil and gas leasing. The Pickett Act of 1910 used the same language, and it is settled law that that act authorizes withdrawals from oil and gas leasing. Thus the phrase is a phrase of art and its appearances in the orders must be construed to close the lands to leasing.

There is no convincing evidence of consistent administrative construction to the contrary. In fact the evidence shows that during this period the Department considered the language such as these two orders contain to effect a withdrawal from leasing, and specifically excepted the Mineral Leasing Act when that was the design.

III

The express purpose for the creation of the Kenai Range by the President was the protection of the giant Kenai moose, a unique wildlife feature, which purpose is clearly inconsistent with any uncontrolled oil and gas leasing activity of the area. Until 1958 when the Secretary, pursuant to new and completely revised wildlife regulations, approved by express order a detailed operating plan worked out by the Fish and Wildlife Service and Bureau of Land Management for the protection of the moose covering the specific lands involved in this case, there were no procedures available for leasing these closed portions of the Kenai Range. All of the Secretary's public orders dealing with the Range since its creation prior to 1958 are consistent with the Range being closed, and Respondents, as well as other members of the public, were entitled to so rely.

IV

The "Congressional ratification" urged by the Government simply does not exist. The great bulk of the material upon which this argument depends did not result in legislation, and the only positive thing it shows is that the leasing program on wildlife refuges was confused. The Alaskan Submerged Lands Act did not ratify anything. It merely provided relief for those who had a valid right to a lease. Furthermore the material presented to Congress in connection with this Act does not reveal whether any of the applications or leases discussed were invalid under our view of the case.

V

The Government does not urge that the holders of the outstanding leases which must be cancelled if Re-

spondents prevail are indispensable parties to this action. The point was not raised below and is properly waived by the Government.

Furthermore it is settled that these lease holders are not indispensable parties. The Court of Appeals for the District of Columbia Circuit laid that question to rest in *Barash* v. *Seaton*, a case which Respondents contend was properly decided.

ARGUMENT

I. THIS CASE CONCERNS ONLY THE VALIDITY OF TEN LEASES WITHIN THE KENAI NATIONAL MOOSE RANGE.

The Government's attempt to extend the significance of this case beyond its facts necessitates that at the outset we make clear precisely what is and what is not involved here. This litigation does not involve "the security of the title of hundreds of persons" nor investments "of the magnitude of tens of millions of dollars" as the Government would have the Court believe. Rather, the case involves only ten leases covering a total of 25,000 acres[12] upon which, to Respondents' knowledge, there has been absolutely no drilling or production of gas ond oil.[13] That was all that was before the court of appeals and all that is before this Court. Nothing in the opinion below requires the sweeping consequences predicted by the Government

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[12] The decision below was based upon a construction of specific Executive and Public Land Orders. Similar wording in other orders does not pose a problem with regard to any future oil and gas leasing in other areas because the Secretary possesses full power to change or revise the terms of any withdrawals of public land. Exec. Order No. 10355, 17 Fed. Reg. 4831 (1952).

[13] Some of the 25,000 acres have been included with other lands on which wells have been drilled under unit agreements.

nor need an affirmance by this Court have such effect. There are several reasons for this.

In the first place, the decision below was nothing more than a determination of which conflicting applicants for noncompetitive leases were entitled to leases under Section 17 of the Act. There is nothing in the record to show that there were any other conflicting lease offers for lands within that portion of the Range which the court of appeals held was closed. In the absence of another qualified applicant the Act does not require cancellation of an otherwise acceptable offer which was accepted and suspended when it should have been rejected.[14]

Second, even if there were conflicting offers, the period in which the unsuccessful offerors could assert their rights has long since passed.[15] To Respondents' knowledge, they are the only ones who have preserved

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[14] See *L.N. Hagood*, 60 I.D. 462 (1951). The rule that applications for leases on lands which are not available for leasing will be rejected is an expression of administrative policy rather than a statutory command. *J.G. Hatheway*, 68 I.D. 48, 52 (1961). The Secretary's discretion over the administration of the public land laws is broad enough to enable him to make an exception to this policy in cases where the lease was issued to the only qualified applicant and the lessee has made substantial expenditures in reliance thereon.

[15] § 42 of the Mineral Leasing Act expressly provides:

> "No action contesting a decision of the Secretary involving an oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter." 30 U.S.C. § 226-2.

The Department's Rules of Practice provides that appeals within the Department must be made within 30 days of the adverse decision, 43 CFR §§ 221.3, 221.33 (1963).

their rights. And only they have standing to challenge the validity of existing leases within the Range.[16]

Third in the absence of a challenge to the validity of existing leases, the Secretary need not sua sponte cancel any other outstanding leases within the Range on the basis of the decision in this case. See *Safarik* v. *Udall*, 304 F. 2d 944 (D.C. Cir.), *cert. denied* 371 U.S. 901 (1962). Finally, this Court clearly has the power to make its decision operate prospectively only, thus removing for all time any doubt as to the validity of any other existing leases.[17]

II. EXECUTIVE ORDER NO. 8979 AND PUBLIC LAND ORDER NO. 487 BY THEIR TERMS CLOSED THE LANDS INVOLVED TO OIL AND GAS LEASING.

The Court of Appeals held that Executive Order No. 8979 which created the Kenai National Moose Range withdrew from oil and gas leasing the lands upon which nine of the ten Respondents filed applications and that the lands filed upon by Respondent Coyle (which were included in lands specifically excepted under E.O. 8979) were subsequently withdrawn by Public Land Order No. 487. It is undisputed that if these orders did close the lands involved to leasing, the

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[16] It is clear that under Departmental decision once a lease issues, even though it is void, the lands embraced therein are not available for leasing and applications to lease them must be rejected. e.g. *Joyce A. Cabot, Allan B. Cabot, Walter G. Davis*, 63 I.D. 122 (1956). Thus there is no way whereby future applicants can obtain standing to urge that all leases within the withdrawn area are nullities.

[17] *Great Northern Ry.* v. *Sunburst Co.*, 287 U.S. 358, 364 (1932); *Griffin* v. *Illinois*, 351 U.S. 12, 26 (1956) (Separate opinion of Frankfurter, J.); *Safarik* v. *Udall*, 304 F. 2d 944, 949, 50 (D.C. Cir., *cert. denied* 371 U.S. 901 (1962). Prospective application appears appropriate where a lease has issued, the time for challenge passed and investment made in reliance upon its validity.

Respondents are the first qualified applicants for the leases and the judgment below must be affirmed.[18] It is the contention of the Respondents that the clear language of these orders compels the conclusion that they had that effect. The orders will be discussed in turn.

A. Executive Order No. 8979 by Its Plain Terms and by the Construction Given Those Terms Closed Those Portions of the Range to Which It Was Applicable to Oil and Gas Leasing

Executive Order No. 8979 provided in pertinent part:

> None of the above-described lands excepting [a specified area which included the lands of the Coyle application] shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming and for other purposes", 44 Stat. 821, U.S.C. title 48, secs. 360-361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C. title 48, secs. 471-471o: * * * *

The court of appeals correctly held that this language "clearly did remove the land involved from oil and gas leasing." The language of withdrawal is extremely broad, and when read with other parts of the order, it is obvious that the Order was intended to have an expansive meaning. Thus, immediately following

[18] The Secretary conceded in the court of appeals that if any of the orders closed the range, the only possible defense would be the statute of limitations, a point not raised in this Court.

the language above quoted the Order deals with the lands excepted from its effect in the following manner:

> * * * *Provided, however,* that as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the National Moose Range shall be without interference with the *use and disposition thereof* pursuant to the public-land laws applicable to Alaska * * * (Emphasis added.)

The phrase "use and disposition" contained here refers to that which is forbidden by the withdrawal clause, and the presence of the word "use" in this part of the order clearly indicates that the withdrawal was not limited to those activities which terminate in the passage of a fee, as the Government argues, but includes any use pursuant to the public land laws, not otherwise excepted.

Furthermore, the language of withdrawal was not limited to the words "settlement, location, sale or entry" (although those alone would have been sufficient to close the lands to leasing, see discussion *infra*) but contained the inclusive phrase "or *other disposition* under *any* of the public land laws applicable to Alaska." (Emphasis added) The Mineral Leasing Act is clearly a public land law applicable to Alaska, and was so considered in 1941. The Secretary's own regulations expressly recognize this fact.[19] It is also

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[19] The Secretary's regulations in effect at the time of the Order read in pertinent part:

> Part 51—PUBLIC LAND LAWS APPLICABLE TO ALASKA
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> Section 51.1 GOVERNING LAWS:
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> • • • •
>
> . . . in Section 3 of the Act of August 24, 1912 . . . It was provided that "the Constitution of the United States, and all

virtually incontestable that the term "disposition" in the Order must be read to include leasing. Section 1 of the Mineral Leasing Act expressly states that

> "Deposits of . . . oil, oil shale, or gas, *and lands containing such deposits* [with certain inclusions and exceptions] *shall be subject to disposition in the form and manner provided by this Act* . . . . 41 Stat. 438 (1920) 30 U.S.C. § 181 (Emphasis added.)

And Section 17 which deals specifically with the issuance of oil and gas leases begins with the sentence "*All lands subject to disposition under this Act* which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior" 60 Stat. 951 (1946), as amended 30 U.S.C. § 226 (1958).[20] (Emphasis added) The fact that a lease is a form of

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the laws thereof which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States."

In an opinion dated June 29, 1915 (30 Op. Atty. Gen. 387), the Attorney General had occasion to consider the effect of the Act of August 24, 1912, in respect to extending certain public-land statutes to Alaska, and in this connection, he stated: "The express exception of the Public Land Laws, found in the earlier organic acts, is here omitted; all the laws of the United States are to operate in Alaska save only such as may be locally inapplicable". 43 CFR § 51.1 (1939). (This regulation has remained substantially unchanged. See 43 CFR § 51.1 (1964).)

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71.1 STATUTORY AUTHORITY. The disposition of oil and gas deposits in lands owned by the United States in Alaska is governed by the Act of February 25, 1920 . . . known as the Mineral Leasing Act. 43 CFR § 71.1 (1939) (Substantially the same section existed in the 1964 edition).

[20] See also § 29, 41 Stat. 449, 30 U.S.C. § 186 (1958) which gives the Secretary authority to reserve "the right *to lease, sell or otherwise dispose of*" the surface of certain lands (Emphasis added).

disposition has also received judicial recognition. In *West* v. *Work,* 11 F. 2d 828, 831 (D.C. Cir.) *cert. denied* 271 U.S. 689 (1926), the court said that the Mineral Leasing Act:

> * * * was * * * the expression of a new policy for the *disposition of public lands open to exploration or entry,* by lease, instead of by complete alienation. (Emphasis added)

and this language was quoted with approval in the recent case of *Pan American Petroleum Corp.* v. *Pierson,* 284 F. 2d 649, 654 (10th Cir. 1960), *cert. denied* 366 U.S. 936 (1961).[21] Thus, both Congress and the courts have used the term "disposition" in relation to oil and gas leasing, and from this it must follow that the President was so using it in Executive Order No. 8779.

The correctness of the construction given the Order by the court of appeals is confirmed by the parenthetical exception of fish trap sites, which, as that court recognized, would be unnecessary if the Order were designed to cover only total alienation of the interest of the United States. Fish trap sites are licensed by the Secretary, not deeded.[22] Some reason must be given for this exception, and the only reason-

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[21] See also *Kenney Coastal Oil Co.* v. *Kieffer,* 277 U.S. 488, 491 (1928).

[22] Act of June 6, 1924, 43 Stat. 464, as amended 48 U.S.C. § 221 (1958); *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 121 (1949). The court of appeals was of the opinion that those licenses are similar in many respects to a lease (R. 88). The fact that such licenses are regulatory does not detract from the correctness of this observation. In practical effect, the issuance of a fish trap license granted an exclusive right to set traps in a specific area. See *Dow* v. *Ickes,* 123 F. 2d 909 (D.C. Cir. 1941), *cert. denied* 315 U.S. 807 (1942).

able explanation of its presence is that without it the order would prevent the issuance of fish trap licenses. If this be so, *a fortiori* oil and gas leasing is also embraced within the language of the Order.

The two other specific Alaska statutes included in the withdrawal are by no means inconsistent with the construction given the Order by the court of appeals. As the court noted these are not public land laws of general applicability throughout the country. Furthermore, they are the only land laws applicable only to Alaska which required specific treatment.[23] Thus, the Order withdraws the lands from use under any

[23] The Order creating the range reserved the lands for the use of the United States and withdrew them from the effect of the public land laws of general applicability. The remaining laws applicable only to public lands in Alaska either extend certain of the general laws to Alaska, concern specific lands, or by their terms or the regulation under them are limited to unreserved lands. See 38 Stat. 1214 (1915), 48 U.S.C. § 353 [reservation of lands for educational purposes; existing reservations excepted]; 52 Stat. 593 (1938), 48 U.S.C. § 353a [Gives Secretary discretion to withdraw and reserve small tracts for Indian schools and hospitals, etc. (makes no disposition)]; 38 Stat. 1215 (1915), 48 U.S.C. § 354 [Grants specific lands to Alaska for agricultural school and school of mines]; 45 Stat. 1091 (1929), 48 U.S.C. § 354a [Gives Alaska right to select unreserved lands; See 43 CFR § 76.6 (1954)]; 26 Stat. 1099 (1891), 48 U.S.C. § 355 [Makes general town-site entry law applicable to Alaska]; 31 Stat. 330 *(1900)*, 48 U.S.C. § 356 [Concerns lands occupied by missionaries in 1900]; 34 Stat. 197 *(1910)*, 48 U.S.C. § 357 [Homestead allotments to Indians. Statute gives Secretary discretion to make allotment. Regulations make it clear this concerns only unreserved lands. See 43 CFR § 67.5 (1954)]; 26 Stat. 1101 (1891), 48 U.S.C. § 358 [A specific reservation established]; 49 Stat. 1250 (1936), 48 U.S.C. § 358a [Concerns land reserved for Indians;]; 54 Stat. 1192 (1940), 48 U.S.C. § 363 [Gives Secretary power to lease or sell unreserved land to cities and towns]; 30 Stat. 409 (1898), as amended 48 U.S.C. § 371 [Extends homestead laws to Alaska. Regulation also specifically excludes reserved or withdrawn lands. See 43 CFR § 65.1 (1954)];

conceivable law and recognizes what was implicit in the Secretary's regulations,[24] i.e., that the phrase "public land laws applicable to Alaska" refers to laws of general applicability.

In its language Executive Order No. 8979 is unique, which makes the Departmental Memorandum and the commentator cited by the Government in an attempt to limit the scope of the language totally inapplicable. In point of fact in only one instance has the Departmen considered language in any way similar to this,[25] and Mr. Hoffman whom the Government cites and who apparently relied on this Memorandum, is careful to

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42 Stat. 415 (1922); 48 U.S.C. § 376 [Entry on coal, oil, or gas lands which are unreserved. See 43 CFR § 66.1 (1954)]; 31 Stat. 326 (1900), as amended 48 U.S.C. § 381. [Extends general mining laws to Alaska]; 30 Stat. 409 et seq. (1898), 48 U.S.C. § 411 et seq. [Railroad rights of way; made specifically inapplicable to reserved lands by § 7 of Act, 30 Stat. 412, 48 U.S.C. § 417]; 30 Stat. 414 (1898), 48 U.S.C. § 421 [Provided for sale of timber under Secretary's regulations. Regulations specifically exclude reserved lands. 43 CFR § 79.2, 16 (1954); 38 Stat. 741 et seq. (1914); 48 U.S.C. § 432 et seq. [Leasing of coal lands. Regulation specifically deals with withdrawn lands. Agency having control of area has a veto. 43 CFR § 70.5 (1954). Furthermore, Kenai is not classified as coal land] 30 Stat. 413 (1898) as amended 48 U.S.C. § 461 [Trade or monufacturing sites. It is clear that lands must be unreserved. 43 CFR § 81.1 (1954)].

[24] 43 C.F.R. Part 51 (1939). Set out supra at note 19.

[25] Memorandum of the Solicitor, 48 I.D. 459 (1921) considered a statute which withdrew lands from "entry, location, or other disposal." Respondents have found no other Departmental action which has dealt with such language, and the validity of this opinion is questionable in view of the opinion of this Court in *Mason* v. *United States*, 260 U.S. 545, 553-55 (1923) and of the court of appeals in *Wilbur* v. *United States ex rel Barton*, 46 F. 2d 217 (D.C. Cir. 1930) aff'd 283 U.S. 414 (1931). Furthermore it was not considered good authority by the Department itself at the time this Order was issued. See discussion *infra* pp. 31-36.

restrict his opinion to the "ordinary" case. The fish trap exception, the specific reference to particular Alaska statutes, and the language "use and disposition" in the section dealing with excepted lands clearly take this Order out of the ordinary case.

Thus even without considering the effect of the words "settlement, location, sale or entry" it is crystal clear that the Order closed the lands to oil and gas leasing. However, as will appear from the following, these words, without more, were sufficient to so close the lands.

B. The Terms "Settlement, Location, Sale or Entry" in Both Executive Order No. 8979 and Public Land Order No. 487 Were Sufficient to Close the Lands to Leasing

Public Land Order No. 487 which the court of appeals held closed the lands embraced by Respondent Coyle's application provided in relevant part:

> Subject to valid existing rights, the public lands within the following described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation: * * *

The phrase "settlement, location, sale, or entry" which appears in both this Order and Executive Order No. 8979, had through Congressional use and judicial construction become a phrase of art which included oil and gas leasing. The so-called Pickett Act[26] upon the authority of which Public Land Order No. 487 was expressly based contains virtually identical language:

> The President may, at any time in his discretion, temporarily withdraw from *settlement, location,*

[26] 36 Stat. 847 (1910), 43 U.S.C. § 141 (1958).

> *sale or entry,* any of the public lands of the United States, including Alaska. * * * (Emphasis added.)

The use of this language in both the Executive Order and the Public Land Order is obviously a paraphrase of the Pickett Act. It is a recognized historical fact that the Pickett Act was passed to ratify the President's withdrawal of the public lands known to be valuable for oil and gas deposits.[27] In *Wilbur* v. *United States ex rel Barton*, 46 F. 2d 217 (D.C. Cir. 1930), the Court of Appeals for the District of Columbia squarely rejected a contention that this language was not sufficient to include oil and gas leasing:

> But it is insisted that the Act of 1910 only authorizes the temporary withdrawal by the President of public lands "from settlement, location, sale, or entry," and that the application for permit and lease which may follow discovery of oil under the Act of 1920 are not embraced within those terms. *It is apparent, we think, that the Act of 1910 was intended to be of wide scope and recognized the authority of the President temporarily to prevent the alienation of public lands or any interest therein adverse to the United States.*
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> * * *
>
> Under the Act of 1920, the applicant for a permit was required to locate and designate the lands sought in his application. The issuance of a permit and the discovery of "valuable deposits of oil or gas" entitled him to a lease—an interest in the land. This, we think, was akin to location or entry, as used in the act of 1910. (46 F. 2d at 220-221; emphasis added.)

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[27] See *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915). The President's request that Congress ratify his action is at 45 Cong. Rec. 621-22 (1910).

That decision was affirmed by this Court.[28] And in *Bordieu* v. *Pacific Western Oil Co.*, 299 U.S. 65 (1935) this Court construed an Executive Order containing language virtually identical to that in Public Land Order No. 487 to close the land to mineral leasing.

Thus it is obvious that this phrase alone is sufficient to close the lands to leasing, and that its use in Public Land Order No. 487 must be given that effect. That this was the intent of the Order is made even clearer by its references to Executive Order No. 8979:

> This Order shall take precedence over, but shall not modify, * * * the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941.

And by the fact that, for the most part, it operated upon lands left open by the Executive Order.[29] It is also significant that paragraph 2 of Public Land Order No. 1212 which revoked Public Land Order 487 expressly withdrew certain lands "from all forms of appropriation under the public-land laws, including the mining, but not the mineral leasing laws" while paragraphs 6 and 7 opened certain lands and specifically included the mineral leasing laws. About 9 months later, the order was amended to delete references to the mineral leasing laws *only* in paragraphs 6 and 7. By retaining the express exception in paragraph 2, the

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[28] *United States ex rel McLennan* v. *Wilbur*, 283 U.S. 414, 419 (1931).

[29] Since the 1941 Executive Order provided that the excepted lands should remain part of the National Moose Range although open to use and disposition pursuant to the public land laws applicable to Alaska, the effect of Public Land Order No. 487 operating thereon was to place the land in the same status as the non-excepted closed area of the Range.

amendment brought the Order into conformity with the established practice of the time[30] as well as with the clear meaning of the language used. From this it appears that whatever the present construction of language such as appears in these Orders, the Department has not always been so consistent as the Government would have the Court believe. In fact, as we shall now demonstrate it appears that the construction and practice of the time these orders were issued was entirely consistent with the concept that such language withdrew lands from leasing.

C. A Contrary Administrative Construction of Similar Language Has Not Been Established

The Government relies almost entirely upon an asserted consistent administrative construction of the language of these orders. However, there is little positive evidence of this. In fact, most of the evidence is adverse to the Government's position.

The Government's claim that the Department has never construed the term "disposition" to include leasing rests almost entirely upon a 1921 Memorandum of the Solicitor, 48 I.D. 459.[31] However, as we have pointed out, this Memorandum insofar as it considers a

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[30] See discussion *infra* p. 34.

[31] The quote from Mr. Hoffman's treatise contained at pp. 9-10 of the Government's brief is undoubtedly based upon this opinion, although no authority is given for the statement. In this connection it should be again noted that the language of Executive Order No. 8979 is unique in that the term "disposition" is qualified by parenthetical exception for fish trap sites and further explained as embracing "use" when read in *pari materia* with the provision covering the excepted area. Mr. Hoffman recognized that his statement is not categorical and the 1921 opinion did not consider the language of this order.

lease to be something other than a disposition, is at odds with the use of the term in the Mineral Leasing Act and its subsequent use by the courts. Furthermore, the 1921 Memorandum is contrary to the express holding of the court of appeals in *Wilbur* v. *United States ex rel. Barton,* 46 F. 2d 217, 220-221 (D.C. Cir. 1930), *affirmed,* 283 U.S. 414, 419 (1931), which holds that the words of the Pickett Act authorizing withdrawal from "settlement, location, sale or entry" even without the word "disposal" are sufficiently broad to accomplish a withdrawal of lands from leasing under the Mineral Leasing Act. See *supra,* pp. 29-30. In addition, the 1921 Memorandum is based upon a doctrinaire application of the rule *ejusdem generis* which is at odds with the limitation on that rule subsequently discussed by this Court in *Mason* v. *United States,* 260 U.S. 545, 553-555 (1923):

> * * * it is insisted that the order does not apply to the cases here presented. The point sought to be made rests upon the rule of statutory construction that words may be so associated as to qualify the meaning which they would have standing apart. Here, it is said, the general words of the order, "or other form of appropriation," must be read in connection with the specific words "settlement and entry," immediately preceding; and that, so read, they must be restricted to appropriations of a similar kind with those specifically enumerated. The words "settlement and entry," it is said, apply only to the act of settling upon the soil and making entry at a land office; as, for example, under the Homestead Laws; that mining lands are acquired, not by settlement or entry, but by location and development; and that this process is not covered by the words "other form of appropriation," limited, as they must be, by the associated specific words, to those forms of appropriation

which are akin to a settlement and entry. The rule is one well established and frequently invoked, but it is, after all, a rule of *construction*, to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate . . . We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order, and consequently were prohibited by it." (*Id.* at 553-55).

Furthermore, until recently the 1921 memorandum has been virtually ignored by the Department. For example, an Order of the Acting Secretary dated September 26, 1933, withdrew certain lands from "all forms of disposition under the Public Land Laws",[32] yet in 1945 it was thought necessary to amend this Order specifically to permit leasing.[33] Similar references to a lease as a disposition of land are frequent within the Department.[34]

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[32] See *Mary E. Brown*, 62 I.D. 107, 108 (1955).

[33] 10 F.R. 11257 (1945).

[34] See *Devearl W. Dimond*, 62 I.D. 260 (1955) (Statute withdrawing lands from all forms of entry or disposal held to include leasing); *G.E. Kadance & Sons*, 65 I.D. 446 (1958) (Same); Bureau of Land Management Suspension Order of March 30, 1956, *infra* Appendix C. *Cf. J.G. Hatheway*, 68 I.D. 48, 51 (1961) (Refers to a lease as a disposition).

Nor is there any substantial support for the Government's claim of a consistent policy of specifically including oil and gas leasing in orders designed to close the lands to it. In the first place, a review of Executive Orders and Public Land Orders in general reveals that they often expressly provided that the land should be open to mineral leasing while using language similar to Executive Order No. 8979, Public Land Order No. 487, and the Pickett Act to effect the withdrawal.[35] From these orders it would appear that at least during the period which produced Orders 8979 and 487, it was a consistent practice to consider the words "settlement, location, sale or entry" as closing the lands to leasing and to expressly except the mineral leasing laws when that was the intent of the order. The case for such a practice is strengthened by the fact that in the same year Public Land Order No. 487 was issued, the Department held lands closed to leasing under an order which contained the words "settlement, location, sale or entry" and made no mention of the leasing laws.[36]

Thus, it appears that by their clear language, those orders closed the lands to leasing. While the language of Order 487 is not as broad as 8979, the history of the language used and the obvious fact that the two Orders must be read together makes it clear that 487 was intended to preclude leasing. And it is difficult to imagine broader language than that contained in Executive Order No. 8979. Indeed, only by

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[35] A list of withdrawal orders generally is contained in Respondents' Appendix D, Table 2; orders relating specifically to wildlife refuges are listed in Appendix D, Table 1.

[36] *D. Miller*, 60 I.D. 161 (1948). The Order involved was Executive Order No. 5214 (Oct. 30, 1929). The fact that this case was overruled some 7 years later by *Noel Teuscher*, 62 I.D. 210 (1955), does not detract from the construction given these words in 1948.

construing the Order as did the court of appeals can it be read as a meaningful and harmonious whole. To the contrary, the Secretary urges a construction which renders the exception for fish trap sites meaningless, ignores the usage given the word "disposition" by both Congress and the Courts, and which overlooks his own practice during the period as revealed in his decisions and orders. In defense of this construction, he argues that it is not an unreasonable one, and that this Court should defer to it. However, it is Respondents' understanding that judicial deference to the Secretary's construction of statutes and executive orders is something less than a grant of absolute power over the English language.[37] He may not, like Lewis Carroll's

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[37] The court below approached the Executive Order and the Public Land Order with deference to the Secretary's construction of them. Still after full consideration of this and the subsequent regulations and notices that court was of the opinion that the Secretary's construction was "unreasonable and should not stand". The Government now argues that since the Secretary had the power to change the Executive Order at will, the entire question is one of form only. Such an argument is patently erroneous, for it assumes that the form of an order or a regulation is not at all important. This is not and never has been the rule, for while an administrative construction of words which may be changed at will must be given deference by the courts, that deference is not without its limit. At the very least it must not be plainly erroneous or inconsistent with that which is construed, *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). If this rule is to have any substance at all, words with meanings established by judicial construction and Congressional use (and in accord with the administrative practice of the time which produced them) must be given those meanings. And clearly so long as the Orders were in effect the Secretary was bound to observe them. See *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955).

The Government insists on inflating the significance of this case by asserting that affirmance would void leases in the entire Kenai Range. This simply is not true, and when the case is placed in its proper perspective the importance of the administrative construction is accordingly diminished.

Humpty Dumpty, make words mean only what he chooses them to mean "neither more nor less".[38] These orders were published to inform the public of the status of the land. If the Secretary has the power to ignore the established usage of words as well as the practice of the time and over a decade[39] after their publication announce his own contrary construction of them, then the requirement of publication is an empty form.

III. THE POLICY WHICH PROMPTED THE CREATION OF THE RANGE AND THE SECRETARY'S PUBLIC ACTIONS SUBSEQUENT TO THE ORDERS ARE CONSISTENT WITH THE RANGE BEING CLOSED.

The basic purpose of the Kenai Moose Range was to protect "the natural breeding and feeding range of the giant Kenai moose" which presents "a unique wildlife feature" belonging to the people of the United States. In order to accomplish this purpose the President deemed it necessary to make an "across the waterfront" withdrawal prohibiting every conceivable use of the area under the public land laws. As such, the Kenai withdrawal is quite different from other reservations for wildlife purposes which provide only that the lands shall be "reserved and set apart"[40] or which

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[38] Carroll, COMPLETE WORKS OF LEWIS CARROLL 214 (Modern Library Ed.).

[39] As will appear in the following section, the Secretary made no public act that could possibly be considered inconsistent with the clear meaning of these Orders until 1956 when leases were issued in the Swanson River Unit, and even the issuance of those leases is consistent with the lands being closed by the Executive Order. Thus for all practical purposes there was no administrative construction of Public Land Order No. 487 while it was in effect, and none of the Executive Order until fifteen years after its promulgation. Even then the regulations and orders are wholly consistent with the range being closed.

[40] See e.g. Exec. Order No. 8116, 4 F.R. 1997 (1939); Exec. Order No. 8167, 4 F.R. 2410 (1939).

expressly permit oil and gas leasing.[41] That there was to be no multiple purpose development of the closed area of the Kenai Range was made even more clear when the order prohibited leasing for fur farms and livestock grazing under the special Alaska statutes, which certainly would have been less inconsistent with protection of the giant Kenai moose than the commercial construction activity normally attendant the drilling of oil and gas wells on lands.[42]

At the time that the representatives of major oil companies filed their lease offers between October 15, 1954 and January 28, 1955, there was no change in the published terms of the Executive Order of 1941 creating the Moose Range as supplemented by Public Land Order No. 487 of 1948. Not only did the express withdrawal language negative any indication of multiple development of the Kenai Range but at that time there were no protective procedures of any sort for multiple development of such closed areas. In fact, at that time it appears that even in all of the refuges owned by the United States throughout the country which were expressly open by their terms to mineral leasing, there had been only eleven leases issued, in spite of the procedures available for leasing open lands.[43] Since absolutely no procedures were available

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[41] See Table 1, Resp. Appendix D hereto.

[42] For an example of the extent of surface operation that may be required for oil and gas drilling, see *Kinney Coastal Oil Company* v. *Kieffer*, 277 U.S. 488 (1928). That extensive use of the surface in developed oil and gas fields may be required is a matter of common knowledge from developed fields in the United States. Certainly it is difficult to imagine the developed oil fields of Texas or other producing states as providing a conducive natural habitat for the rearing of moose.

[43] See H. Rept. No. 1941, 84th Cong., 2d Sess., pp. 5, 10 (1956).

for leasing closed portions of the Kenai Range, the oil company representatives in filing for the lands were pure speculators, gambling that they could acquire valuable rights in the nation's only giant moose reserve."[44]

The next public statement by the Secretary regarding the Range, Public Land Order No. 1212 of September 9, 1955, made it clear that the excepted area withdrawn by Public Land Order No. 487 had been deemed closed to mineral leasing.

As noted previously this Order provided initially that a small portion of land (not involved here) was "withdrawn from all forms of appropriation, including the mining, *but not the Mineral Leasing Laws . . .*" (par. 2 Emphasis added). As to the bulk of the lands withdrawn, the Order, in paragraph 4, provided that it would not "otherwise become effective to change the status of the remaining lands" until a certain date and these lands would thereafter "become subject to settlement, *application,* petition and selection as follows." (Emphasis added.) The Order then established a

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[44] It is clear, and the Government does not contend otherwise that the Regulations of October 29, 1947 (12 F.R. 7334; Pet. App. 3a) did not purport to open any refuges closed by the terms of the orders creating them and were applicable only to refuges in which leasing was possible.

The leases which petitioner alleges (based on its extra-record, ex parte investigation of Anchorage Land Office Records) were issued in the Kenai Range prior to this time (January 1955) were intended to be issued for lands completely outside the Moose Range. The extent of the speculation is further seen by the fact that even in 1958 when the Secretary finally acted with respect to the withdrawn area of the Kenai Range he kept a large portion of it closed. See *infra* p. 45.

schedule for disposal of the lands which terminated in paragraphs six and seven.

> 6. Any of the lands described in paragraphs 4(a), 4(b) or 4(d) of this order then remaining unappropriated, shall become subject to such application, petition, selection, or other form of appropriation by the public generally, as may be authorized by the public-land laws, *including the mineral-leasing laws.* * * *
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> 7. Commencing at 10:00 a.m. on the 182nd day after the date of this order, any of the unsurveyed lands described in paragraph 4(c) not settled upon by veterans or other persons entitled to credit for service shall become subject to settlement and other forms of appropriation by the public generally, *including leasing under the mineral leasing laws.* * * * (Emphasis added.)

It is clear that the language of this order contemplated that the lands upon which it operated had been closed to all forms of appropriation including leasing. Paragraph 2 made a positive withdrawal and expressly excepted the Mineral Leasing Laws. Paragraph 4 stated that the status of the lands (under Public Land Order No. 487) shall not be changed until a certain date and at that time shall become subject to, inter alia "application" (a term which obviously contemplates leasing)[45] and paragraphs six and seven fix the time at which the "status of the lands" would be changed so so far as leasing is concerned. Thus, as the Government concedes in its brief, the Order seems "to be based on the premise that the lands had not been available

[45] See section 17 of the act, as amended 30 U.S.C. § 226 (c), 43 CFR § 192.44; 43 CFR § 295.8 defines the term "application" as including "offers to lease, filed pursuant to the regulations in any part of this chapter."

for leasing under Public Land Order No. 487" (Brief for petitioner p. 30), and as the Government also admits, any other construction gives rise to confusion. Thus, the only reasonable construction of this Order is that it returned the lands to the status created by Executive Order No. 8979. i.e., the bulk of the lands were closed to any form of disposition (which term includes leasing) and the remainder open. Any other construction clashes with the language of the Order. In short, Order 1212 did exactly what the Government admits it seemed to do; it opened previously closed lands to mineral leasing.

The Secretary's attempt to justify his asserted "consistent" construction of Public Land Order No. 487 by reference to the October 4, 1955, amendment to Order 1212 is wholly unconvincing. In the first place, if this amendment, which only deleted reference to the mineral leasing laws in paragraphs 6 and 7, was intended to point out that the lands had never been closed to leasing, it was done in a totally ineffective manner. No mention was made of the language in paragraph 4, which speaks in terms of changing the status of the lands and making them subject to application. In fact, the amendment had no effect whatsoever upon the Order except to make references to the mineral leasing laws in paragraph 2 consistent with the rest of the Order and with the practice then in vogue of specifically excepting the mineral leasing laws when wildlife refuges and ranges were closed to leasing by Pickett Act language.[46] No substantive change was made, apparently none was intended. The important thing about this amendment is not that it

[46] See Table 1, Appendix D, *infra*.

afforded "a dramatic reaffirmation of the Secretary's consistent interpretation of Public Land Order 487", but that it left unchanged an Order which when read in conjunction with Public Land Order 487 gives a clear notice that that portion of the range which it affected had been closed to leasing, just as Order 487 said it had. If the Secretary had wanted to give any other impression, surely he would have amended Section 4 as well, for it is from there that the contrary impression arises.

On December 8, 1955, the Secretary published a revision of his regulations governing the issuance of leases on wildlife refuges. The effect of this regulation upon the lands in question is not clear. One thing is clear, however, and it is that this regulation is not, as the Government contends, a reaffirmation of the pre-existing availability of the lands for leasing. This regulation contained two appendixes: Appendix A which listed refuges closed to leasing and Appendix B which listed refuges upon which leases could issue after the approval of an operating program. However, according to the then Secretary, some of the refuges in Appendix A had been open to leasing prior to that time[47] and Appendix B lists one area, the Salt Plains in Oklahoma, parts of which had prior thereto clearly been closed to leasing.[48] Thus, it is apparent that the

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[47] 102 Cong. Rec. 260 (1956). The language of the orders creating the refuges are in no way similar to that of Executive Order No. 8979. On the contrary, they contain only general words of reservation such as "reserved and set apart." See, for example, Exec. Order No. 7593, March 3, 1937 (Okefenokee), Exec. Order No. 7023, April 22, 1935 (Red Rock Lakes), Exec. Order No. 3596, Dec. 22, 1921 (National Bison Range).

[48] Public Land Order No. 144, 8 Fed. Reg. 9430.

two lists had been compiled without regard to whether the refuges contained therein were opened or closed by the order which created them. This being so, the regulation is worthless as an indication of the pre-existing status of any lands.

Further, the 1955 regulation was not clear as to its applicability to the bulk of the withdrawn lands in the Kenai Moose Range (not in the excepted area). The 1955 regulation, in contrast to the revised regulations of 1958, in no way expressly indicated whether it was intended to cover all wildlife refuges, even those which by the terms of the order creating them were closed to oil and gas leasing. Appendix B expressly listed some portions within the withdrawn area of the Kenai Range as available for leasing but only on two conditions: (a) prior approval by the Director, Fish and Wildlife Service of a "complete and detailed operating program for the area, which will insure full protection of the particular values for which established" and (b) submission of such an operating program within 6 months failing which "all pending applications . . . will be rejected." Confusion as to the applicability of these Appendix B requirements arose when the Department apparently applied them to the issuance of a block of 31 leases in 1956 for the Swanson River Unit, which was not within the specified area set forth in Appendix B of the regulation.[49]

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[49] See *supra* pp. 8-10, and Resp. Appendix E hereto. In referring to the Swanson River Unit, the Government is building an argument based upon facts which are not a part of this record, an argument which depends upon the contents of records located in Alaska for verification. These leases were not mentioned in either the district court or the court of appeals, and if the Government in-

But while applying the Appendix B procedures to non appendix B lands to permit leasing of the Swanson River Unit, the Department inconsistently did not apply the further mandate of Appendix B to reject all pending applications for which an operating program was not filed within 6 months. Regardless of this inconsistency, however, it is clear that the Department treated the Swanson River Unit as specifically authorized by the 1955 regulation.

Thus the December 1955 regulations which did not specifically refer to the lands involved in this case are not clear whether (1) the regulations cover these lands at all; (2) even if covered, whether in view of the Department's action thereunder, they were to be treated under Appendix B procedures requiring a development plan in six months, failing which any applications must be rejected; or (3) leasing was otherwise authorized by the 1955 regulations. But regardless of how the inherent threefold ambiguity in the 1955 regulation is resolved, under none could it validate the 1954 and 1955 applications by the oil company representatives filed on the lands involved in this case prior to the issuance

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tended to press such arguments at this stage, it should have made a proper record below.

The wisdom of disallowing these ex parte declarations of unproved fact is illustrated by a map which the oil companies attempted to submit to the court below (attached hereto as Appendix F). This map shows that except for the Swanson River Unit no leases were issued within the area withdrawn by Executive Order No. 8979 prior to 1958. See also H. Rep. No. 1941, 84th Cong. 2d Sess. p. 18 (1956) which contains a list of all leases issued in the Range prior to that date. This list does not include the lease which the Government asserts was issued in 1953. Furthermore, without a knowledge of where those leases were located, the fact of their issuance is meaningless. As we have pointed out some of the Range was never closed to leasing, and other parts were opened in 1955 by PLO 1212.

of the December 1955 regulation.[50] And one thing is crystal clear—other than the Swanson River Unit which was authorized only after approval of the complete detailed operating program for protection of wildlife required by Appendix B of the regulations, there was no other program for protection of the wildlife for the withdrawn area of the Moose Range prior to those specifically authorized by the Secretary in 1958. As the map submitted by the oil companies to the court of appeals shows,[51] all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941 Executive Order or were in the Swanson River Unit, specifically treated as authorized by the Appendix B procedure of the 1955 regulation.[52]

As previously noted the general regulation of January, 1958 (43 C.F.R. § 192.9) followed a comprehensive examination of all wildlife lands owned by the United States, regardless of whether they had been previously closed or open to oil and gas leasing. The language of the regulation is express on this point (*supra* p. 12). The Kenai lands were placed in the category of "Alaska wildlife areas" and provision was made for leasing them only if future specific agreements could be worked out between the Bureau of Land Management and the Fish and Wildlife Service

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[50] It is noteworthy that a Congressional Committee investigating leasing practices in Wildlife refuges prior to 1956 reported a picture of "extreme administrative confusion", H. Rep. No. 1941, 84th Cong. 2d sess. p. 19 (1956), and the Chairman of that committee characterizes this report "most charitable" to the Secretary. 102 Cong. Rec. 5798 (1956).

[51] See *supra*, note 49, pp. 42-43.

[52] See Respondent's Appendix F hereto.

for the protection of wildlife. Obviously the requirement for such agreements was in keeping with the conservation policy expressed in the 1941 Executive Order, and the fact that an agreement was made a condition precedent to leasing in 1958 is further indication that the order of 1941 prevented it entirely.

After setting forth procedures for the publication of these agreements in the Federal Register, the regulation made an express provision for the processing of pending applications. This is an obvious reference to the general suspension order which had been in effect since 1953. This regulation refers to all wildlife areas, not just to Kenai, and must be read as a reference to all suspended applications pending on lands open to leasing. As regards Kenai there was a portion of the range that had never been closed to leasing and another portion that had been opened by Public Land Order 1212.

A few weeks thereafter the Secretary announced that he had approved a classification of the Range. The announcement emphasized that *opening* a portion of the Range was considered "entirely consistent with the primary purpose for which the range is managed." This announcement was followed by the order of August 2, 1958, which designated an area in the Southern part as "*not opened* to oil and gas leasing." (Emphasis added.) The northern lands opened by this order embraced both the area originally withdrawn by the 1941 order and the excepted area which was open but upon which leasing had been suspended. As in the regulation a provision was made for the processing of pending applications, but it is to applications pending on the excepted area that this provision refers.

The Order, which for the first time since its creation in 1941 clearly offered the withdrawn northern portion

of the Kenai Range for leasing was premised on the agreement consummated pursuant to and after the 1958 regulations between the Bureau of Land Management and the Fish and Wildlife Service determining which portion of the Range could be leased compatibly with its management for wildlife purposes.

The Respondents duly filed their offers in accordance with the procedures set out by the Secretary's Order of August 2, 1958.[53]

In September, 1958, without any notice to Respondents, the Land Office issued the leases to the oil company representatives. A year later on September 4, 1959, the Land Office gave notice of a public drawing to determine priority among those filing pursuant to the August 2, 1958 Order, including Respondents (R. 18-26). A drawing was held pursuant to the drawing regulations[54] in which Respondents were selected as the first qualified applicants only to be advised by the Land Office in a decision dated October 7, 1959, that their lease offers were rejected.

Respondents as members of the public were entitled to rely on the clear meaning of the 1941 Executive Order creating the Moose Range as closed to oil and gas leasing under the public land laws. Certainly the Secretary's public actions subsequent to the 1941 Executive Order are consistent with this plain meaning. Until 1958 and the express regulations and Order

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[53] Earlier in May of 1958 Respondents filed offers for the same lands involved in the present case, but these offers were rejected and returned to them by the Land Office on the ground that the lands were closed until after the Secretary issued an Order announcing consummation of the wildlife protection agreements.

[54] 43 C.F.R. 295.8.

issued by the Secretary clearly opening part of the withdrawn portion of the Range to oil and gas leasing only upon the consummation for the first time in early 1958 of an agreement by the Fish and Wildlife Service and Bureau of Land Management for the protection of the moose on the lands involved, no procedures existed whereby there could be any multiple development of these closed portions of the Range. Respondents alone complied with the procedures.

It is unreasonable to condone the action of the oil company representatives upon this wildlife preserve of the nation in filing speculative offers four years prior thereto in the face of the clear language of the Executive Order at a time when there were absolutely no safeguards or other procedures to protect the national breeding and feeding range of the giant Kenai moose, that "unique wildlife feature" which provided the whole *raison d'etre* for the President's creation of the Range.

IV. CONGRESS NEITHER APPROVED NOR RATIFIED THE ISSUANCE OF THE LEASES WHICH CONFLICT WITH RESPONDENTS' APPLICATIONS.

The "Congressional ratification" of the Secretary's interpretation of the 1941 Executive Order which the Government urges is without foundation. The cases cited by the Government are totally inapposite to the situation here. The concept of Congressional ratification presupposes knowledge of the administrative practice and some affirmative action by Congress which unequivocally ratifies it, such as an appropriation for its support.[55] Obviously informal committee advice and

[55] See *Brooks* v. *Dewar*, 313 U.S. 354, 361 (1941); *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, 119 (1947). Compare *Ex Parte Endo*, 323 U.S. 283, 303 (1944).

legislative inaction cannot constitute Congressional approval.[56] The most that can be said for those hearings in the 84th Congress which produced House Report No. 1941 is that they demonstrated to a Congressional committee that the leasing program on wildlife ranges generally was so confused that some supervision was necessary.[57]

The subsequent hearings on the proposal to lease the Swanson River Unit at best demonstrate that there was some confusion within the Department over leasing on wildlife refuges. One assistant solicitor expressed a private opinion that Executive Order 8979 did not close the range to leasing.[58] However, the Committee had earlier heard from another assistant solicitor that the Secretary had the power to issue leases on lands expressly withdrawn from oil and gas leasing and had exercised that power.[59] That contention has apparently now been abandoned by the Department despite the fact that under the Government's theory it too was ratified

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[56] Compare *Power Reactor Dev. Co.* v. *Electrical Union*, 367 U.S. 396, 409 (1961).

[57] See House Rep. No. 1941, 84th Cong. 2d Sess. pp. 10-11 (1956). The Committee was informed that leases had issued in the Kenai Range but there is nothing to indicate where those leases were located, and as a matter of fact none of them were intentionally within the area closed by Executive Order 8979.

[58] That opinion was based on the same Departmental cases upon which the Government now relies and which, as we have shown, are wholly without value in construing the order. See discussion *supra* pp. 31-34.

[59] See Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, 84th Cong. 2d Sess. p. 137 (1956). See also Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 2101, 84th Cong. 2d Sess. pp. 67-68 (1956). In view of this assertion by a representative of the Department, it is no wonder that the Committee did not stop to inquire into the effect of the 1941 Executive Order.

by Congress. Finally it should be noted that the power of the Committee to "approve" leasing in the Kenai on behalf of Congress is doubtful and did not go unchallenged on the floor of Congress.[60]

And so far as the Submerged Lands Act is concerned, neither that act or anything in its legislative history can be construed as "ratifying" an administrative construction of the 1941 Executive Order.. The Committee was told of the oil strike on Kenai Range and of pending applications to lease other lands. But it does not follow that Congress intended to ratify every lease issued or every application then pending when it passed the Submerged Lands Act. On the contrary, Congress obviously was legislating without regard to the validity of any leases or pending applications to lease.

Finally, as we have pointed out, the existing leases in the Swanson River Unit were considered authorized by the 1955 regulation, and it is to these leases that the hearings on the bill refer. There were also excepted areas in the range and a number of leases had issued on them. Apparently there were also a number of applications to lease lands in these areas. The hearings do not indicate where the pending applications about which the Committee had been informed were located, and for all Congress knew they were on open lands. Furthermore, not only Congress but the public had been informed that that Secretary planned to lease parts of the Range. His announcement of January 1958 preceeded these hearings by about three months and the passage of the Act by about five. When these facts are considered the case for ratification vanishes.

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[60] 102 Cong. Rec. 5588 (1956).

V. THERE IS NO INDISPENSABLE PARTY QUESTION IN THIS CASE.

The Government has waived any objection to the failure to join the lessees as indispensable parties and urges in its brief that the case be decided without noticing this issue (brief for petitioner p. 32). Having failed to raise the question at any stage of the proceedings below, the Government should not be allowed to do otherwise.[61] Nor are the holders of the leases issued upon these lands in a position to assert this question for the first time.[62]

If, however, the question is considered Respondents respectfully submit that the Court should hold the lessees not to be indispensable parties. Prior to the enactment of Public Law 87-748[63] it was possible to obtain review of Secretarial action such as this only in the District of Columbia,[64] and the Court of Appeals

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[61] See Fed. R. Civ. 12 (h); *Master Crafters Clock & Radio Co.* v. *Vacherow & Constantin-Le Coultre Watchers, Inc.*, 221 F. 2d 464, 462 (2d Cir. 1955), *cert. denied* 350 U.S. 832. The question does not go to the jurisdiction of the Court. *State of Washington* v. *United States*, 87 Fed. 421, 427 (9th Cir. 1936) and cases cited.

[62] Although the absence of an indispensible party may be considered on appeal, the question is not one which categorically requires appellate notice. See *Haby* v. *Stanolind Oil & Gas Co.*, 225 Fed. 723 (5th Cir. 1955); 3 Moore's Federal Practice 2147 (2nd ed. 1963); 71 Harv. L. Rev. 877, 887 (1958). Here the holders of the leases had notice of the termination of the administrative proceedings and were on notice that review was possible in only one court in this country. Yet they made no effort to enter the case until after the decision in the court of appeals, although they had a clear right to intervene in such circumstances. The question should be considered waived as provided in the rule, *cf. Parker Rust Proof Co.* v. *Western Union Telegram Co.*, 105 F. 2d 976 (2d Cir. 1939).

[63] 76 Stat. 744 (1962), 28 U.S.C. §§ 1371, 1391 (e) (Supp. 1962).

[64] 62 Stat. 935 (1948), 28 U.S.C. § 139 (1958); *Thomas* v. *Union Pac. R.*, 139 F. Supp. 588, 596-97 (D. Colo. 1936), *aff'd per curiam* 239 F. 2d 641 (10th Cir. 1956).

for that circuit laid the question to rest in *Barash* v. *Seaton*, 256 Fed. 714, 718 (1958).[65]

Judge Bazelon's decision in *Barash* cited this Court's decision in *Work* v. *Louisiana*, 269 U.S. 250, 254-255 (1925) which distinguished the old cases cited by petitioner. And in *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 300 (1902) this Court held that proposed lessees of oil lands need not be joined in a suit against the Secretary to restrain him from leasing oil lands held for the benefit of Indians.

The *Barash* case is alone consistent with this Court's decision last term in *Boesche* v. *Udall*, 373 U.S. 472 (1963), ruling that the Secretary of the Interior is possessed of administrative authority to cancel oil and gas leases on public lands for invalidity at their inception:

> * * * We hold * * * that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land. (373 U.S. at 485)[66]

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[65] For a similar result see *McKay* v. *Wahlenmaier*, 226 F. 2d 36 (D.C. Cir. 1955) where the court ordered a lease issued by the Secretary in violation of his own regulations to be set aside regardless of the absence of the lessee (Culbertson) as a party to the judicial review proceedings.

[66] In *Boesche* only one of the "competing applicants for the same land" was before the Court. Cuccia and Conley, the adverse applicants to whom the Secretary had directed the issuance of a lease and the cancellation of Boesche's lease, were not parties to the judicial review proceedings.

Under the Departmental practice notice to the lessee is not a condition precedent to administrative cancellation, although the lessee may appeal to the Secretary. *Seaton* v. *The Texas Co.*, 256 F. 2d 718, 721 (D.C. Cir. 1958).

As has been noted, at the time this suit was brought, it could be brought only in the District of Columbia.[67] If the holder of an outstanding lease is always an indispensable party judicial review of the Secretary's decisions would have been frustrated in the great majority of cases arising under the old law, since leaseholders on public lands are seldom to be found within the District of Columbia. Furthermore, as the Government's brief points out, such a decision would run counter to the universal practice of naming only the agency in proceedings to review orders of administrative agencies.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals below should be affirmed.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
ROBERT L. MCCARTY
MCCARTY AND WHEATLEY
1201 Walker Building
Washington, D. C. 20005
Counsel for Respondents

October 1, 1964

[67] See note 64, *supra* p. 50.

RESPONDENTS' APPENDIX A

Executive Order No. 8979, December 16, 1941 (6 F.R. 6471)

EXECUTIVE ORDER

ESTABLISHING THE KENAI NATIONAL MOOSE RANGE

ALASKA

By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211, as amended:

SEWARD MERIDIAN

Beginning at the point of intersection of the west boundary of the Chugach National Forest with the line of mean high tide on the south shore of Chickaloon Bay, in Turnagain Arm of Cook Inlet, in latitude 60°53′ N., and longitude 150° W.;

Thence from said initial point;

Northwesterly with the meanders of the line of mean high tide, on the south shore of Chickaloon Bay to Point Possession;

Thence southwesterly with the meanders of the line of mean high tide on the east shore of Cook Inlet to the Kasilof River;

Thence southeasterly, upstream along the right bank of the Kasilof River to the meander corner on the south boundary of sec. 33, T. 3 N., R. 11 W., Seward meridian;

Thence west, 4.09 chains, to meander corner on south boundary of sec. 32, T. 3 N., R. 11 W.;

Thence southwesterly, along the crest of the watershed, to the divide between the waters flowing into Tustumena Lake and the waters flowing into Cook Inlet and Kachemak Bay;

Thence southeasterly, along said divide to the confluence of the Fox River and the principal stream flowing from Dingiestadt Glacier;

Thence southeasterly, up said stream and across Dinglestadt Glacier to the crest of Kenai Mountains;

Thence northeasterly, along the crest of Kenai Mountains to the west boundary of Chugach National Forest at a point three miles southeasterly from the head of Upper Russian Lake;

Thence northerly, along the west boundary of Chugach National Forest to the place of beginning.

The area described, including both public and non-public lands, aggregates 2,000,000 acres.

None of the above-described lands excepting Tps. 5 N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March

4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: *Provided, however,* That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska; *Provided further,* That the lands in the said excepted areas shall be classified by the General Land Office, Department of the Interior, and those lands classified as not suitable for settlement shall no longer be available for that purpose: *Provided further,* That the reservation for the national moose range shall not operate to prevent the construction and operation of a highway to connect the area open to settlement with the Seward-Sunrise road by the most practicable route: *Provided further,* That any lands within the described area that are otherwise withdrawn or reserved shall be affected by this order only so far as may be consistent with the uses and purposes for which such prior withdrawal or reservation was made.

The provisions of this order shall not prohibit the hunting or taking of moose and other game animals and game birds or the trapping of fur animals in accordance with the provisions of the said Alaska Game Law, as amended, and as may be permitted by regulations of the Secretary of the Interior prescribed and issued pursuant thereto.

This reservation shall be known as the Kenai National Moose Range.

FRANKLIN D. ROOSEVELT
The White House,
December 16, 1941.

[No. 8979]

RESPONDENTS' APPENDIX B

Public Land Order No. 487, June 16, 1948 (13 F.R. 3462)

[Public Land Order 487]

ALASKA

WITHDRAWING PUBLIC LANDS FOR CLASSIFICATION AND EXAMINATION AND IN AID OF PROPOSED LEGISLATION

By virtue of the authority vested in the President by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 U.S.C. Title 43, secs. 141-143), and pursuant to Executive Order No. 9337 of April 24, 1943, it is ordered as follows:

Subject to valid existing rights, the public lands within the following described areas in Alaska are hereby temporarily withdrawn from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation:

KENAI-KASILOF AREA

SEWARD MERIDIAN

Tps. 5 N., Rs. 8 & 9 W.,

T. 4 N., R. 10 W., unsurveyed,
Secs. 4 to 9, inclusive;
Sec. 18.

T. 5 N., R. 10 W.,

T. 6 N., R. 10 W.,
Secs. 30 & 31.

T. 2 N., R. 11 W., unsurveyed,
Secs. 4 to 8, inclusive.

T. 3 N., R. 11 W.,
Sec. 3, unsurveyed;
Secs. 4 to 9, inclusive;
Sec. 10, unsurveyed;
Secs. 16 to 21, inclusive;
Secs. 28 to 33, inclusive.

T. 4 N., R. 11 W., partly unsurveyed.
T. 5 N., R. 11 W.

T. 6 N., R. 11 W.,
Secs. 22 to 36, inclusive.

T. 2 N., R. 12 W.,
Sec. 1, unsurveyed;
Secs. 2, 3, 4, 9 and 10;
Secs. 11 and 12, unsurveyed.

Tps. 3, 4 and 5 N., R. 12 W.

T. 6 N., R. 12 W.,
Secs. 2 and 3;
Secs. 11 to 14, inclusive;
Secs. 23 to 26, inclusive;
Secs. 35 and 36.

The areas described aggregate 169,974 acres, including public and non-public lands.

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This order shall take precedence over, but shall not modify, the withdrawal for classification for national-monument purposes made by Executive Order No. 7888 of May 16, 1938; the reservation for the Kenai National Moose Range made by Executive Order No. 8979 of December 16, 1941; the withdrawal for administrative site purposes made by Public Land Order No. 390 of August 4, 1947; and the withdrawals for air-navigation site purposes made by the orders of the Secretary of the Interior dated March 17, 1941, and October 10, 1942 (Air-Navigation Site Withdrawal No. 156), and the order of the Secretary of the Interior dated May 26, 1948 (Air-Navigation Site Withdrawal No. 248),

C. GIRARD DAVIDSON,
Acting Secretary of the Interior.

June 16, 1948.

[F. R. Doc. 48-5612; Filed, June 23, 1948; 8:46 a.m.]

RESPONDENTS' APPENDIX C

BLM Suspension Action, March 30, 1956

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

TELETYPE

March 30, 1956

IDENTICAL TELETYPE TO EACH
ADDRESS ON ATTACHED LIST
THE SUSPENSION TO APRIL 2, 1956, OF DISPOSITION BY LEASE OR OTHERWISE OR THE GRANTING OF ANY USE OF LANDS IN FISH AND WILDLIFE REFUGES, GAME RANGES AND OTHER LANDS UNDER JURISDICTION OF FISH AND WILDLIFE SERVICE IS CONTINUED UNTIL FURTHER NOTICE. THIS DOES NOT SUSPEND ALL PRELIMINARY ACTION WHICH SHOULD CONTINUE TO BE TAKEN. THE SUSPENSION APPLIES ONLY TO FINAL ACTIONS IN SUCH MATTERS.

/S/ Edward Woozley
WOOZLEY

Copy to:

Eastern States Office
Geological Survey
Donald Chaney, Solicitor's Office
John Farley, Fish and Wildlife Service
BLM Reading File
M Reading File

RESPONDENTS' APPENDIX D

Table 1

Executive and Public Land Orders Creating Wildlife Refuges Issued Between 1937 and 1959 Which Expressly Permit Leasing. Generally, the Language of Withdrawal is Similar to That of the Pickett Act.

	Order	Date	Citation
1. Executive Order No.	7373	5/20/36	1 F. R. 428
2.	7522	12/21/36	2184
3.	7833	3/ 7/38	3 F. R. 520
4.	7983	9/19/38	2389
5.	8038	1/25/39	4 F. R. 391
6.	8039	1/25/39	391
7.	8592	11/12/40	5 F. R. 4478
8. Public Land Order No.	243	9/ 6/44	9 F. R. 11400
9.	252	12/ 6/44	14649
10.	286	6/26/45	10 F. R. 8559
11.	319	5/13/46	11 F. R. 5746
12.	817	4/14/52	17 F. R. 3495
13.	866	9/23/52	8653
14.	1435	6/22/57	22 F. R. 4418
15.	1512	10/ 2/57	7786
16.	1584	2/13/58	23 F. R. 947
17.	1597	3/13/58	1734
18.	1634	5/17/58	3403
19.	1636	5/20/58	3403
20.	1766	12/19/58	9782
21.	1942	8/12/59	24 F. R. 6713

Table 2

Withdrawal Orders Issued Between 1937 and 1955 Which Expressly Permit Mineral Leasing While Using Language Similar to Executive Order No. 8979 or Public Land Order No. 487 to Effect the Withdrawal.

		Order	Date	Citation
1.	Executive Order No.	7616	5/13/37	2 F. R. 835
2.		7662	7/17/37	1251
3.		7669	7/19/37	1261
4.		7670	7/19/37	1262
5.		7671	7/19/37	1262
6.		7672	7/19/37	1263
7.		7673	7/19/37	1264
8.		7674	7/19/37	1265
9.		7675	7/21/37	1283
10.		7693	8/19/37	1430
11.		7734	11/ 1/37	2414
12.		7760	12/ 3/37	2679
13.		7866	4/14/38	3 F. R. 764
14.		7867	4/15/38	764
15.		8459	6/27/40	5 F. R. 2435
16.	Public Land Order No.	243	9/ 6/44	9 F. R. 11400
17.		252	12/ 6/44	14649
18.		264	3/ 5/45	10 F. R. 2886
19.		278	5/21/45	6313
20.		286	6/26/45	8559
21.		295	10/ 9/45	13076
22.		300	10/25/45	13720
23.		309	1/ 5/46	11 F. R. 533
24.		319	5/15/46	5746
25.		330	11/ 6/46	13638
26.		338	1/ 7/47	12 F. R. 398
27.		433	12/26/47	13 F. R. 321
28.		459	3/31/48	1763
29.		494	7/ 6/48	3870
30.		498	7/13/48	4189
31.		503	2/27/48	4481
32.		519	8/30/48	5312
33.		549	1/31/49	14 F. R. 546
34.		550	2/ 4/49	695
35.		552	2/ 4/49	797
36.		560	2/11/49	858
37.		564	2/21/49	958
38.		567	2/25/49	1006
39.		574	3/25/49	1501
40.		575	3/29/49	1520

		Order	Date	Citation
41.	Public Land Order No.	622	12/15/49	14 F. R. 7646
42.		633	2/ 6/50	15 F. R. 740
43.		643	5/ 9/50	2877
44.		644	5/ 9/50	2877
45.		648	6/ 5/50	3623
46.		698	2/12/51	16 F. R. 1638
47.		699	2/12/51	1639
48.		702	3/ 5/51	2234
49.		725	6/ 4/51	5444
50.		734	7/20/51	7329
51.		735	7/26/51	7571
52.		736	7/27/51	7871
53.		741	8/ 9/51	8113
54.		742	8/ 9/51	8184
55.		745	8/16/51	8465
56.		752	9/ 7/51	9316
57.		753	9/14/51	9569
58.		758	10/22/51	10948
59.		759	10/22/51	10948
60.		760	10/22/51	10948
61.		766	11/23/51	12095
62.		768	12/12/51	12703
63.		769	12/12/51	12703
64.		773	12/19/51	13095
65.		779	12/29/51	17 F. R. 160
66.		797	1/25/52	925
67.		811	3/ 7/52	2132
68.		817	4/14/52	3495
69.		829	5/16/52	4709
70.		831	5/21/52	4711
71.		832	5/21/52	4822
72.		839	6/19/52	5731
73.		845	6/24/52	5909
74.		846	6/26/52	5992
75.		866	9/23/52	8653
76.		891	4/21/53	18 F. R. 2294
77.		904	7/10/53	4048
78.		908	7/31/53	4659
79.		909	7/31/53	4659
80.		914	8/27/53	5295
81.		915	9/23/53	6242
82.		918	10/ 8/53	6565
83.		920	10/12/53	6635
84.		960	4/30/54	19 F. R. 2670
85.		962	5/10/54	2781
86.		964	5/13/54	2899
87.		973	6/18/54	3840

		Order	Date	Citation
88.	Public Land Order No.	977	6/23/54	19 F. R. 3939
89.		979	6/25/54	4033
90.		983	7/22/54	4632
91.		989	8/10/54	5179
92.		990	8/11/54	5179
93.		993	8/16/54	5333
94.		1003	9/ 3/54	5866
95.		1008	9/ 8/54	5929
96.		1011	9/21/54	6227
97.		1014	10/ 1/54	6477
98.		1015	10/ 1/54	6477
99.		1028	12/ 4/54	7296
100.		1040	12/22/54	9278
101.		1046	12/28/54	20 F. R. 53
102.		1052	1/12/55	400
103.		1054	1/18/55	548
104.		1055	1/18/55	548
105.		1057	1/19/55	549
106.		1058	1/19/55	549
107.		1059	1/21/55	618
108.		1060	2/26/55	687
109.		1073	2/18/55	1176
110.		1074	2/18/55	1176
111.		1079	2/25/55	1313
112.		1080	2/28/55	1362
113.		1082	3/ 4/55	1438
114.		1089	3/10/55	1584
115.		1091	3/10/55	1610
116.		1094	3/15/55	1660
117.		1095	3/15/55	1660
118.		1098	3/17/55	1778
119.		1110	3/31/55	2172
120.		1112	4/ 5/55	2310
121.		1119	4/12/55	2576
122.		1120	4/12/55	2576
123.		1122	4/12/55	2576
124.		1144	5/ 4/55	3151
125.		1155	5/27/55	3876

RESPONDENTS' APPENDIX E

Aug. 7 - 1956

MEMORANDUM

To: Director, Bureau of Land Management
From: Director, Fish and Wildlife Service
Subject: Kenai National Moose Range—Operating Program—Richfield Oil Corporation

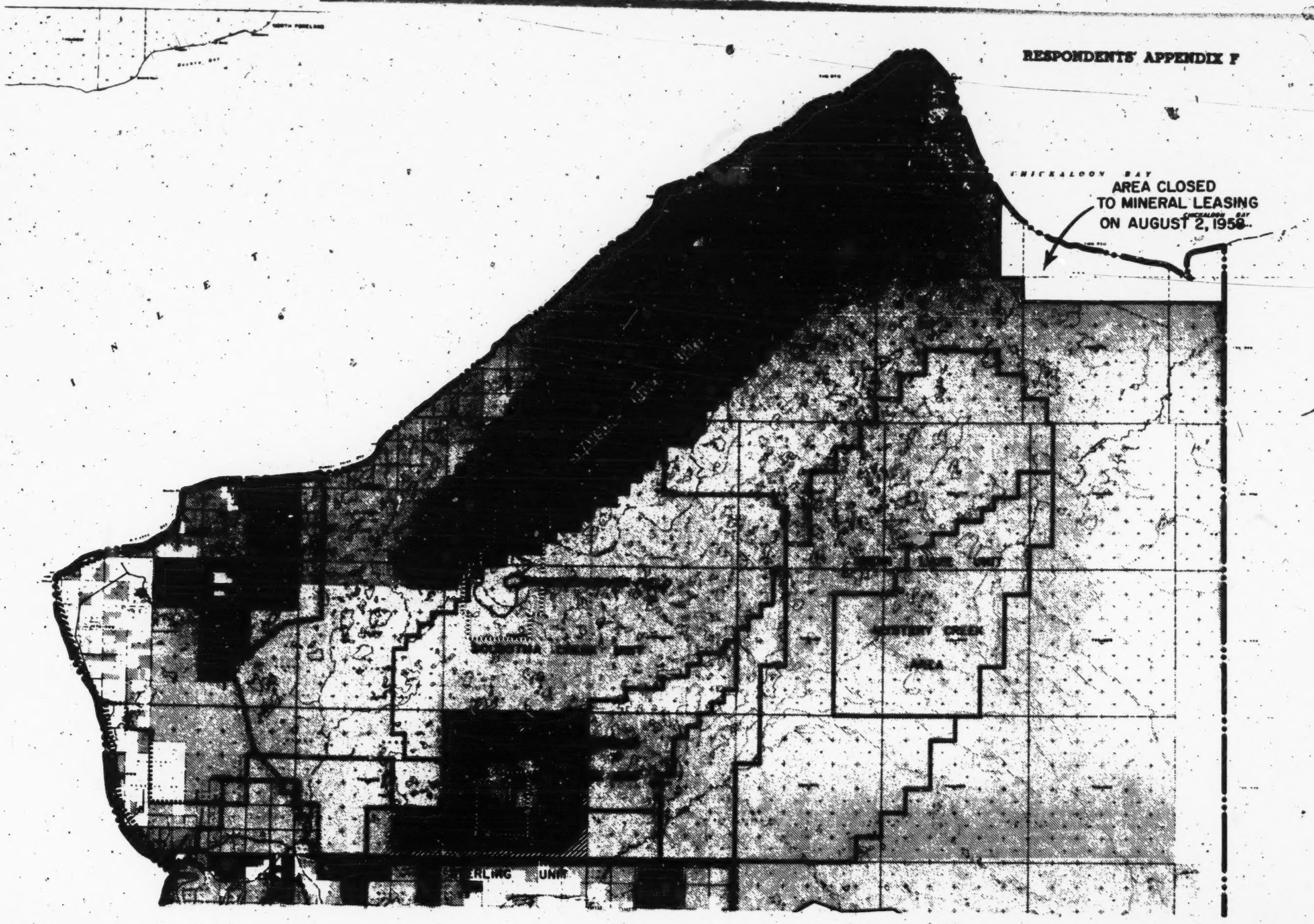
In accordance with the provisions of 43 CFR 192.9 (Circular 1945) an operating program has been approved by this Service, copy attached, for operations in the Swanson River Unit Area, Territory of Alaska, under Contract No. 14-08-001-2969 that was approved by the Geological Survey on July 31, 1956.

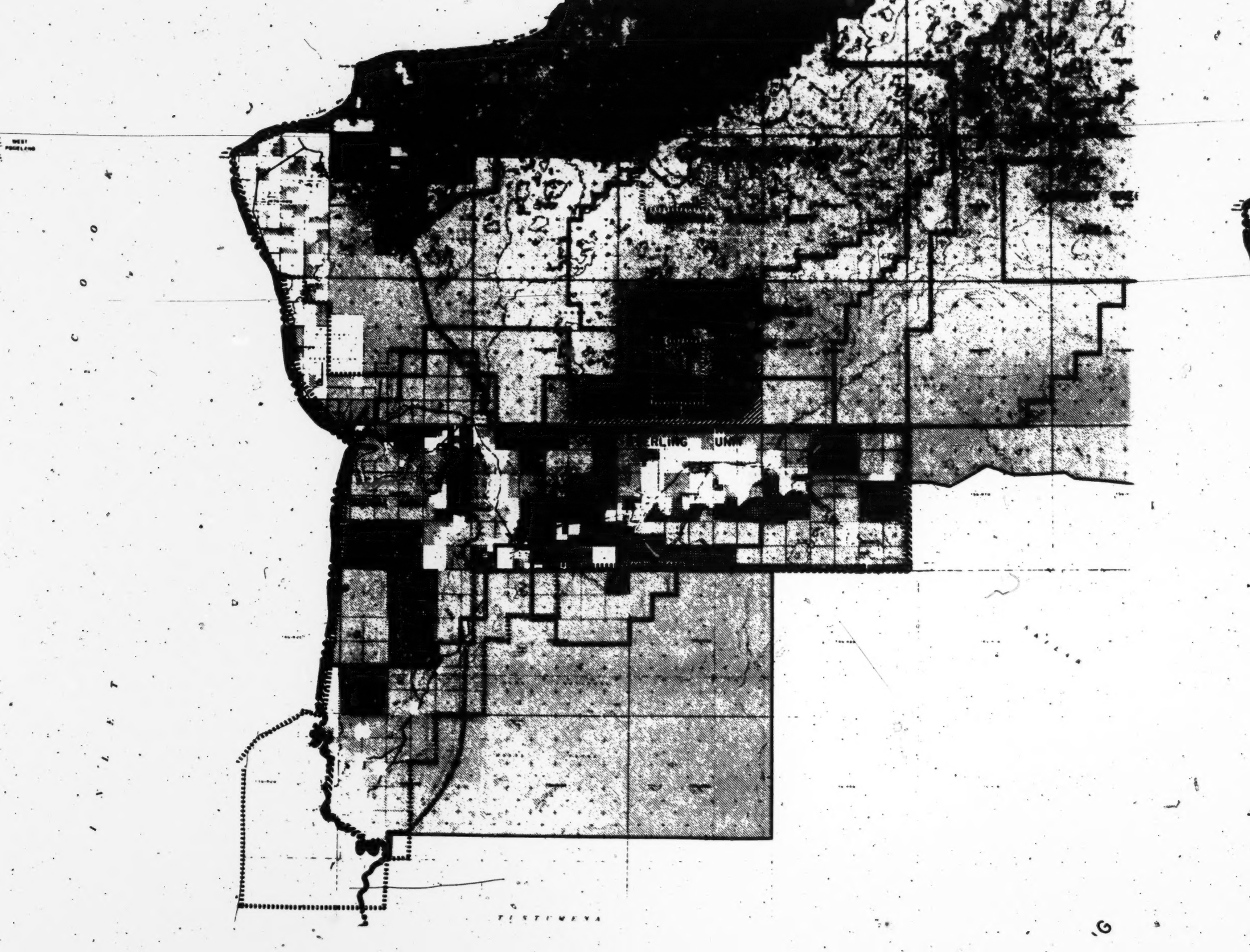
Oil and gas leases may be issued for the lands of the Kenai National Moose Range that are included within the said unit area, provided the lessees comply with the requirements of the operating program.

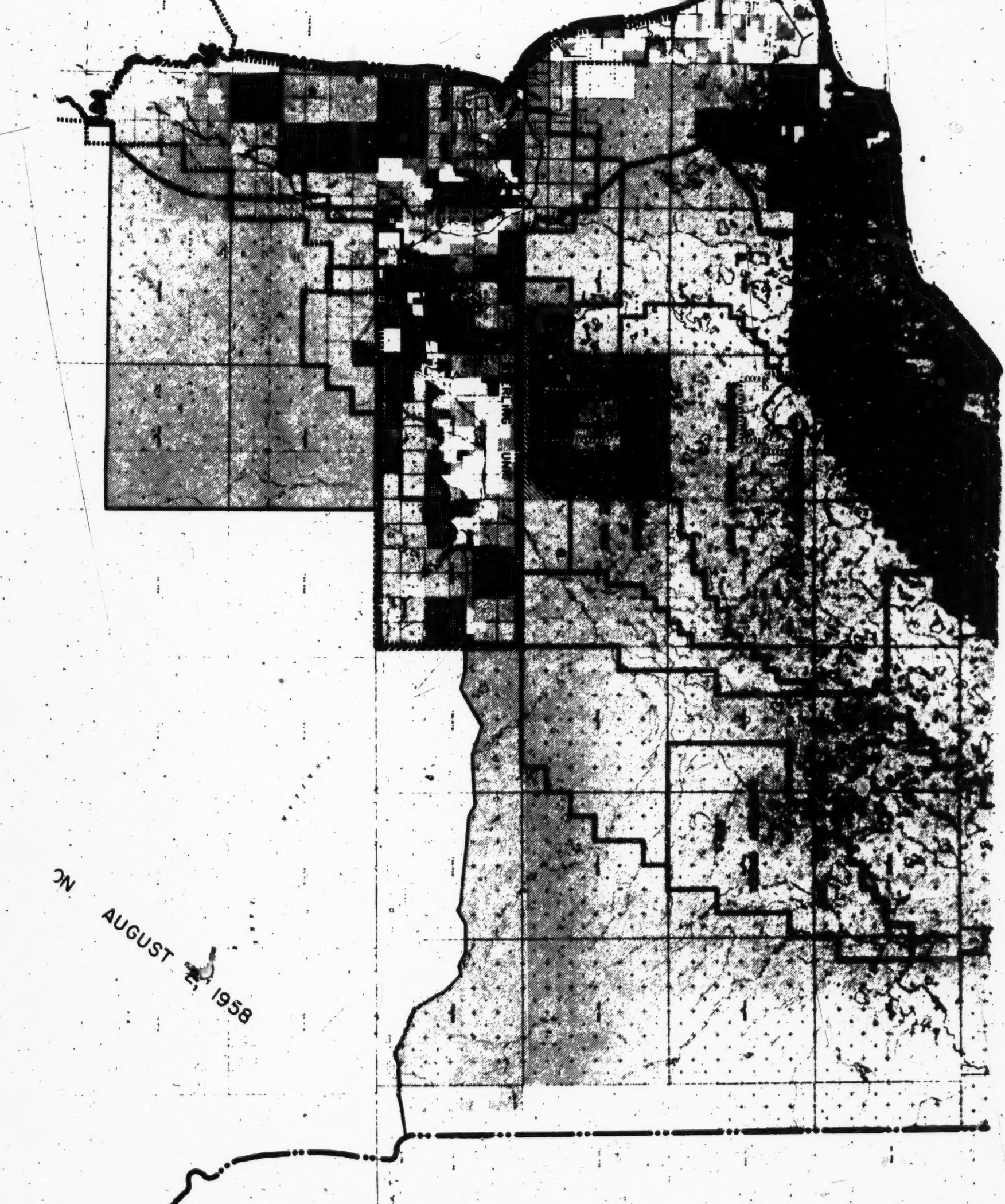
(SGD) JOHN L. FARLEY

Attachment

RESPONDENTS' APPENDIX F






AUGUST 2, 1958

AREA CLOSED TO MINERAL LEASING ON AUGUST 2, 19

TUSTUMENA

LAKE

LEGEND

KENAI MOOSE RANGE, EXECUTIVE ORDER NO. 8979 DECEMBER 16, 1941

EXCEPTED FROM EXECUTIVE ORDER NO. 8979

AREA CLOSED TO MINERAL LEASING ON AUGUST 2, 1958

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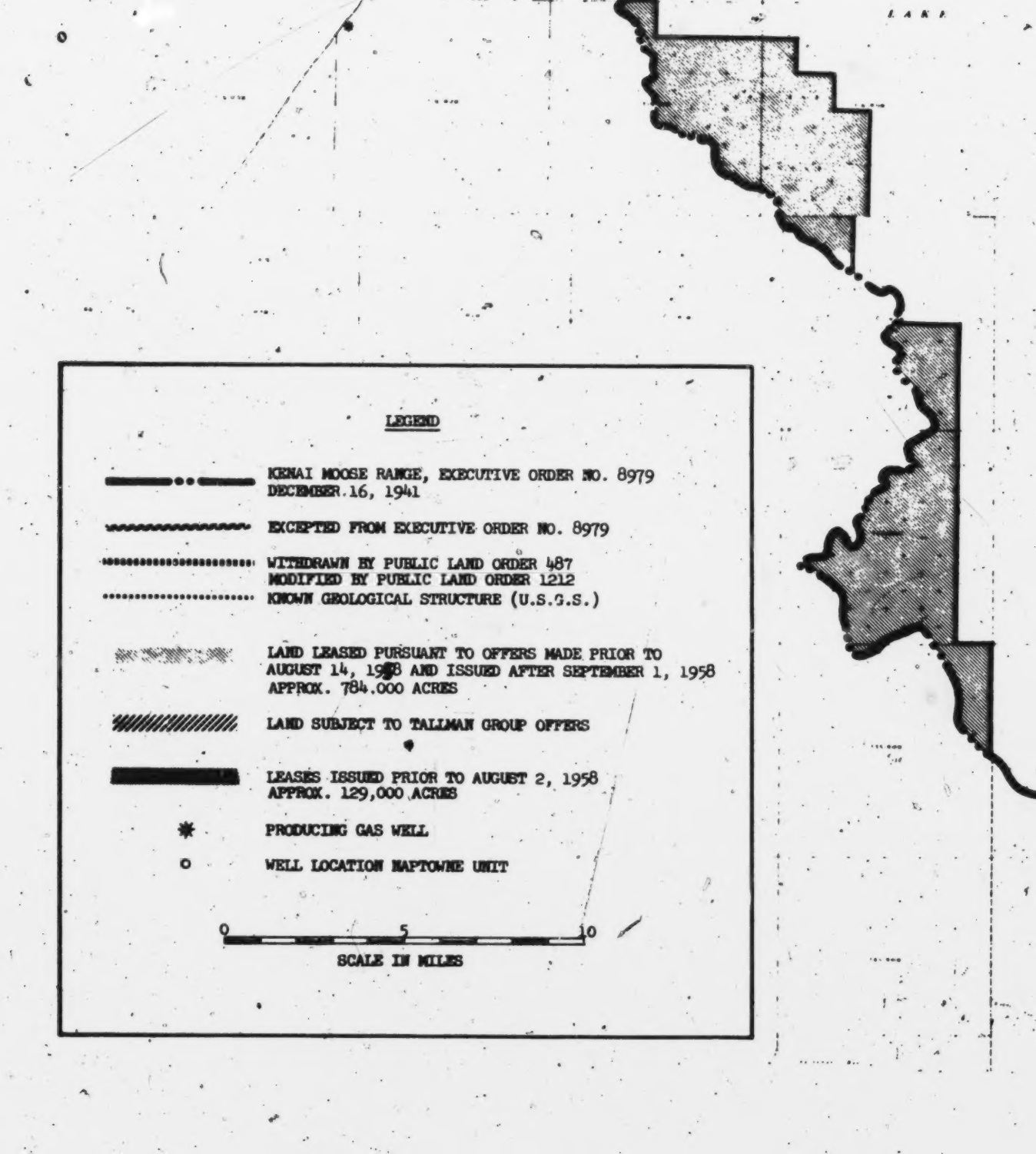
NGE, EXECUTIVE ORDER NO. 8979
941

EXECUTIVE ORDER NO. 8979


LEGEND
KENAI MOOSE RANGE, EXECUTIVE ORDER NO. 8979 DECEMBER 16, 1941
EXCEPTED FROM EXECUTIVE ORDER NO. 8979
WITHDRAWN BY PUBLIC LAND ORDER 487 MODIFIED BY PUBLIC LAND ORDER 1212
KNOWN GEOLOGICAL STRUCTURE (U.S.G.S.)
LAND LEASED PURSUANT TO OFFERS MADE PRIOR TO AUGUST 14, 1958 AND ISSUED AFTER SEPTEMBER 1, 1958 APPROX. 784,000 ACRES
LAND SUBJECT TO TALLMAN GROUP OFFERS
LEASES ISSUED PRIOR TO AUGUST 2, 1958 APPROX. 129,000 ACRES
PRODUCING GAS WELL
WELL LOCATION NAPTOWNE UNIT
0
5
10
SCALE IN MILES

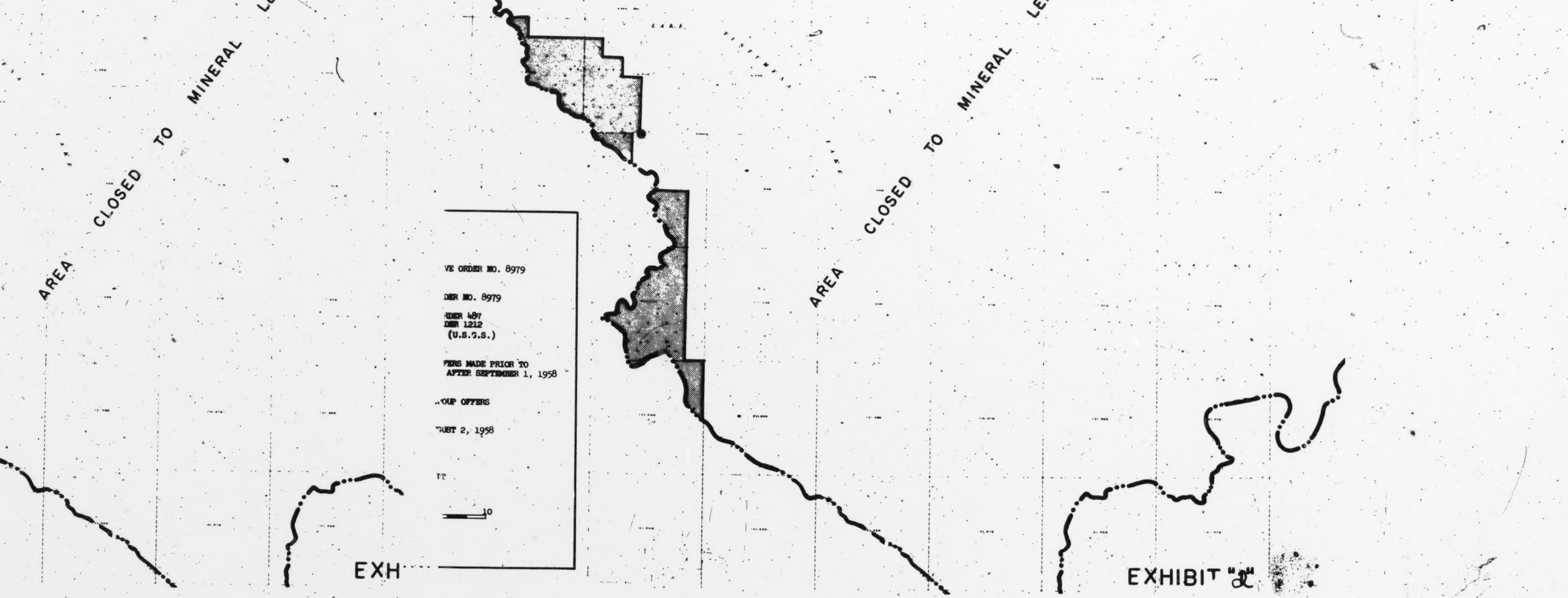

AREA CLOSED TO MINERAL
AREA CLOSED TO MINERAL
VE ORDER NO. 8979
DER NO. 8979
DER 487
DER 1212
(U.S.G.S.)
FERS MADE PRIOR TO
AFTER SEPTEMBER 1, 1958
OUP OFFERS
UST 2, 1958
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EXHIBIT "A"